UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8, MONTANA OFFICE
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HELENA, MONTANA 59626

#E1-64
RD for KB

Ref: 8MO

May 7, 2003

Surface Transportation Board
Case Control Unit,
Att: Kenneth Blodgett
Section of Environmental Analysis
Washington DC 20423-0001

Re: STB Finance Docket No. 30186(Sub-No. 3)
EPA Scoping Comments for Tongue River Railroad, Western Alignment Supplemental EIS, in Rosebud and Big Horn Counties, Montana

Dear Mr. Blodgett:

The Environmental Protection Agency (EPA) Region VIII Montana Office has reviewed the March 26, 2003 amended Notice of Intent (NOI) for the Supplement to the Final Environmental Impact Statement (EIS) for the construction and operation of the Tongue River Railroad, Western Alignment. Our review of the amended Notice of Intent was conducted in accordance with our responsibilities under the National Environmental Policy Act and Section 309 of the Clean Air Act to review and comment in writing on the environmental impacts of any major Federal agency action. EPA's comments include a rating of both the environmental impact of the proposed action and the adequacy of the EIS (see explanation of EPA's EIS rating criteria enclosed).

The amended NOI indicated that the Section of Environmental Analysis (SEA) intends to use the final scope issued in February 1999 for the project, but is requesting comments on whether or how the final scope may now require modification. The EPA submitted scoping comments to the Section of Environmental Analysis (SEA) of the Surface Transportation Board (STB) dated August 20, 1998 in response to the original July 20, 1998 NOI for the Tongue River Railroad Western Alignment. We are submitting several additional comments in regard to recent developments and/or changed circumstances on several issues. Among these issues are: 303(d) listed waters and TMDLs; Cumulative Effects (coal bed methane development); air quality on the Class I Northern Cheyenne Indian Reservation; wetlands; pollution prevention; tribal coordination and environmental justice (see enclosed additional comments and associated discussion).

Our experience has shown that when environmental concerns are thoroughly evaluated, the EIS is a more meaningful document that will result in better decisions. We appreciate the opportunity to provide input, and thank you for your willingness to consider our comments at this stage of the process, and we hope they will be useful to you.

If you have any questions you may contact Mr. Steve Potts of my staff in Helena at (406) 457-5022 or in Missoula at (406) 329-3313.

Sincerely,

John F. Wardell
Director
Montana Office

Enclosure

cc: Cindy Cody/Julia Johnson, EPA, 8EPR-N, Denver
Carole Mackin, MDEQ, Helena
Allan Steinle, COE, Helena
Lou Hanebury, USFWS, Billings
Jeri Small/David Millegan, Northern Cheyenne Tribe, Lame Deer

U.S. Environmental Protection Agency Rating System for Draft Environmental Impact Statements
Definitions and Follow-Up Action*

Environmental Impact of the Action

LO - - Lack of Objections: The Environmental Protection Agency (EPA) review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

EC - - Environmental Concerns: The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce these impacts.

EO - - Environmental Objections: The EPA review has identified significant environmental impacts that should be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no-action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

EU - - Environmentally Unsatisfactory: The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potential unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the Council on Environmental Quality (CEQ).

Adequacy of the Impact Statement

Category 1 - - Adequate: EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis of data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

Category 2 - - Insufficient Information: The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses or discussion should be included in the final EIS.

Category 3 - - Inadequate: EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the National Environmental Policy Act and or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

* From EPA Manual 1640 Policy and Procedures for the Review of Federal Actions Impacting the Environment. February, 1987.

EPA's ADDITIONAL SCOPING COMMENTS FOR TONGUE RIVER RAILROAD WESTERN ALIGNMENT SUPPLEMENTAL EIS

The EPA submitted scoping comments to the Section of Environmental Analysis (SEA) of the Surface Transportation Board (STB) on August 20, 1998 in response to the original July 20, 1998 NOI for the Tongue River Railroad Western Alignment. EPA is submitting these additional comments and associated discussion in regard to recent developments and/or changed circumstances since the original EPA scoping comments were submitted, and since the STB's Final Scope of the Supplement was published in February 1999. Among these issues are: 303(d) listed waters and TMDLs, Cumulative Effects (coal bed methane development), air quality on the Class I Northern Cheyenne Indian Reservation, wetlands, pollution prevention, tribal coordination and environmental justice. These are discussed below.

303 (d) listed Waters and Total Maximum Daily Loads (TMDLs)

In June of 2000 the Federal District Court ordered that EPA and the Montana Dept. of Environmental Quality (MDEQ) develop and approve Total Maximum Daily Loads (TMDLs) for all water quality limited segments on Montana's 1996 Clean Water Act Section 303(d) list of impaired waters by May 5, 2007.

Stream segments designated as "water quality impaired" and/or "threatened" listed by States under Section 303(d) of the Clean Water Act require development of a Total Maximum Daily Load (TMDL). A TMDL:

> *Identifies the maximum load of a pollutant (e.g., sediment, nutrient, metal) a waterbody is able to assimilate and fully support its designated uses; allocates portions of the maximum load to all sources; identifies the necessary controls that may be implemented voluntarily or through regulatory means; and describes a monitoring plan and associated corrective feedback loop to insure that uses are fully supported;*
>
> Or can also be viewed as, *the total amount of pollutant that a water body may receive from all sources without exceeding WQS*; or as *a reduction in pollutant loading that results in meeting WQS.*

Special attention should be made in the Supplemental EIS regarding Montana's identification and validation of water bodies with impaired uses in their Clean Water Act Section 303(d) report potentially impacted by the proposed construction and operation of the railroad. Information on Montana's 303(d) listed waters can be found on-line at http://www.deq.state.mt.us/ppa/mdm/303_d/303d_information.asp . You may also contact staff at the Montana DEQ (Robert Ray of MDEQ at 406-444-5319 or Carole Mackin, at 406-444-7425) and EPA (Ron Steg at 406-4575-24) to help identify and validate listed waters.

The MDEQ has divided the State into TMDL Planning Areas, grouping streams with similar water quality problems and land ownership as much as possible on a watershed basis, and is preparing TMDLs for impaired waters on a watershed basis for the waters within each planning area. Each TMDL planning area may include several impaired watersheds with specific TMDL preparation needs. Surface waters in the Tongue River TMDL Planning Area may be affected by the proposed Tongue River Railroad. The Tongue River TMDL Planning Area includes several impaired water bodies including the Tongue River, Hanging Woman Creek, Tongue River Reservoir, Otter Creek and Pumpkin Creek. We also note that sources of pollutant loading may occur in unlisted tributaries, and TMDLs must account for all sources of pollution, resulting in a need to identify and address pollution sources throughout the watershed, including waters not on the State 303(d) list.

Montana's approach is to include TMDLs as one component of comprehensive Water Quality Restoration Plans (WQRPs). TMDLs/WQRPs contain seven principal components:

1. Watershed characterization (hydrology, climate, vegetation, land use, ownership, etc.)
2. Description of impairments and applicable water quality standards.
3. Pollutant source assessment and estimate of existing pollutant loads.
4. Water quality goals, restoration targets (including TMDLs) and load allocations.
5. Restoration strategy
6. Monitoring Strategy
7. Public involvement (30 day public comment period, informational meetings, etc.)

The load allocations and targets established by TMDLs/WQRPs describe how much sediment, nutrient or other pollutant discharge may prevent support of beneficial uses. A WQRP provides a means to monitor the health of the impaired stream over time. If a WQRP has not restored beneficial uses within five years, the Montana DEQ conducts an assessment to determine if:

* the implementation of new and improved best management practices is necessary;
* water quality is improving but more time is needed to comply with WQS; or
* revisions to the plan will be necessary to meet WQS.

Pending completion of a TMDL in Montana, new and expanded nonpoint source activities may commence and continue, provided those activities are conducted in accordance with "reasonable soil, land and water conservation practices" (MCA 75-5-703). The Administrative Rules of Montana (17.30.602) define these as "methods, measures, or practices that protect present and reasonably anticipated beneficial uses." The EPA believes land management activities carried out in the watershed of 303(d) listed water bodies should not further degrade impaired streams, and should be consistent with long term water quality restoration as being developed with TMDLs and associated WQRPs. This is most easily demonstrated if restoration activities are carried out in association with activities that may produce pollution so that control of existing pollution sources more than compensates for any pollutants generated during railroad

construction and operational activities.

The Supplemental EIS should identify and validate the 303(d) listed streams in the project area which should include the entire railroad corridor from Decker to Miles City. The EIS should discuss the magnitude and sources of such impairment, and show how impairments will not be worsened and that construction and operation of the railroad will be consistent with the Tongue River TMDLs and WQRPs in development to restore water quality for support of beneficial uses.

Cumulative Effects Including Coal Bed Methane Development

The NEPA requires that cumulative impacts be addressed as a summary of the individual impacts of the proposed action and all other past, present, and "reasonably foreseeable" future actions, including evaluation of direct and indirect effects of these projects on all resource categories, including water quality, aquatic habitat, fisheries, wetlands, air quality and wildlife habitat. This includes analysis and disclosure of activities land irrespective of land ownership or what agency/entity has decision-making authority or analysis responsibility.

The EPA believes cumulative impacts analysis and disclosure will be particularly important for construction and operation of the Tongue River Railroad, since there are proposals for significant development of energy resources in the area, including coal bed methane development in addition to coal development. Coal bed methane development includes drilling of wells and construction of pipelines and access roads, pumping stations, electric utility corridors, etc.,. The Supplemental EIS should evaluate coal bed methane development related impacts in the Tongue River Railroad project area, and include the past, present and reasonably foreseeable coal bed methane development in the cumulative effects analysis for the construction and operation of the Tongue River Railroad.

In January 1997 the President's Council on Environmental Quality (CEQ) published, "*Considering Cumulative Effects Under the National Environmental Policy Act*", guidance that provides a framework for analyzing cumulative effects. In May 1997 EPA published a document entitled, "*Consideration of Cumulative Effects in EPA Review of NEPA Documents.*" This document is available at http://www.epa.gov/compliance/resources/policies/nepa/index.html (Click on cumulative effects document title). EPA reviewers consider the following elements to be key toward development of adequate cumulative effects analyses:

1) Determine resources within the project impact area that could be affected by the proposed action, particularly the resource most likely to be significantly impacted (i.e., resources of concern), and use appropriate analysis area boundaries for the resource and time period over which the cumulative effects have occurred or will occur. In most cases, the largest of these areas will be the appropriate area for analysis of cumulative effects.

2) Identify impacts that are expected to resources of concern in that area from the

proposed project through analysis of cause-and-effects relationships (include scientifically defensible threshold levels). Cause-and-effect pathways should be identified to understand how the resources respond to environmental change (i.e., what the effect is). Knowing how a particular resource responds to environmental change (cause-and-effect relationship) is essential for determining the cumulative effects of multiple actions.

3) Identify other actions -past, present, and reasonably foreseeable future actions- that have had or are expected to have impacts in the same area, and the impact or expected impacts from these other actions. Even unrelated actions conducted on adjacent private lands, if they contribute to cumulative effects on a resource, should be incorporated into the analysis (include adequate evaluation vs. benchmark or baseline or reference conditions).

4) Determine the overall cumulative impacts that can be expected if the individual impacts are allowed to accumulate, and provide comparisons of cumulative impacts for the proposed actions and the reasonable alternatives in relation to the no action alternative and/or an environmental reference point. The analyses should provide a clear basis for choice among options by the decision maker and the public. Monitoring should be put in place to evaluate predictions and mitigation effectiveness.

The important factor in determining cumulative impact is the condition of the resource (i.e., the extent to which it is degraded), and the analysis should extend until the resources has recovered from the impact of the proposed action. The EIS should consider how past and present activities have historically affected and continue to affect the resources, ecosystems, and communities of concern. The baseline condition of the resource of concern should include a description of how conditions have changed over time and how they are likely to change in the future with and without the proposed action.

While a broad consideration of resources is necessary for adequate assessment of cumulative impacts, the analysis should be focused on those resources that are significantly impacted. The EIS should identify the resources of concern or ecosystem components that might be affected by the proposed action or its alternatives. The ecological requirements necessary to sustain the resources of concern should be considered when assessing how the project and the other past, present and reasonably foreseeable future actions may cumulatively affect the resources of concern. Often these ecological requirements may extend beyond the boundaries of the project area, but reasonable limits should be made to the scope of the analysis.

A common inadequacy of environmental analyses is the lack of analysis or disclosure of the sum of individual effects of all projects on the local environment. A summary listing of other projects occurring in the vicinity without the accompanying analysis is insufficient. Another inadequacy is that Agencies often tend to limit the scope of their analyses to those areas over which they have direct authority or to the boundary of the relevant management area or project

area. This is may not cover the effects to the area or resources of concern.

It is also important to incorporate future actions of agencies and the public into cumulative impact analyses. Good cumulative effects analysis requires close coordination among agencies and the public to ensure that all past, present and reasonably foreseeable future actions are considered. The EIS must identify the past, present, and future plans and actions regardless of what agency (Federal or non-Federal) or person undertakes such actions, and identify all the direct and indirect effects that are known, and make a good faith effort to explain the effects that are not known but are reasonably foreseeable.

Reasonably foreseeable future actions need to be considered even if they are not specific proposals. The criterion for excluding future actions from analysis whether they are "speculative." In general future actions can be excluded from the analysis of cumulative effects if:

- The action is outside the geographic boundaries or time frame established for the cumulative effects analysis;
- The action will not affect resources of concern that are the subject of the cumulative effects analysis; and
- Including the action would be arbitrary.

The cumulative effects analysis should also include development of mitigation measures to reduce cumulative impacts. Reducing cumulative effects requires repeated testing of the effectiveness of mitigation measures. Cumulative effects analysis, therefore, should be an iterative process in which consequences are assessed repeatedly following incorporation of avoidance, minimization and compensation measures into alternatives.

Air Quality on the Class I Northern Cheyenne Indian Reservation

Air quality impacts of construction and operation of the Tongue River Railroad to the designated Class 1 Northern Cheyenne Indian Reservation should be disclosed, including potential impacts to air quality and visibility for the Class 1 area. We encourage the STB to contact the EPA Region VIII Air Program staff in Denver to obtain additional information and guidance in regard to the appropriate level of air quality analysis and disclosure for the Supplemental EIS (contact Mr. Larry Svoboda at 303-312-6004). The air quality impact analysis should demonstrate conformity with applicable State/Tribal Implementation Plans to avoid adverse PM_{10} and $PM_{2.5}$ impacts. Some air quality data are available from the Northern Cheyenne Tribe's environmental office, and should be used in preparing the EIS.

Potential air quality impacts and mitigation measures for the Tongue River Railroad and coal bed methane development should be included in the cumulative impacts analyses for air resources, particularly considering fugitive dust from the many additional unpaved roads that may occur due to coal bed methane development, in addition to railroad construction and

operation related air pollutant emissions.

Wetlands and Riparian Areas

The Supplemental EIS should identify wetlands and riparian areas potentially affected by project activities. EPA considers the protection, improvement, and restoration of wetlands and riparian areas to be a high priority. Wetlands and riparian areas increase landscape and species diversity, and are critical to the protection of designated water uses. Possible impacts on wetlands and riparian areas include damage or improvement to: water quality, habitat for aquatic and terrestrial life, channel and bank stability, flood storage, ground water recharge and discharge, sources of primary production, and recreation and aesthetics.

The Supplemental EIS must clearly describe the existing wetlands within the analysis area; their acreage, type and ecological role and how both acreage and function will be protected. Railroad construction, land clearing and earthwork generally include sedimentation and hydrologic impacts which at some level may cause changes to surface and subsurface drainage patterns and, ultimately, wetland integrity and function. Executive Order 11990 requires that all Federal Agencies protect wetlands. The EPA considers the wetlands protection provisions of E.O. 11990 to apply to all wetlands (i.e., jurisdictional and non-jurisdictional).

In addition national wetlands policy has established an interim goal of **No Overall Net Loss of the Nation's remaining wetlands**, and a long-term goal of increasing quantity and quality of the Nation's wetlands resource base (see "Presidential Wetland Policy of 1993" at website, http://www.usace.army.mil/inet/functions/cw/cecwo/reg/aug93wet.htm). Wetland impacts should be avoided, and then minimized, to the maximum extent practicable, and then unavoidable impacts should be compensated for through wetland restoration, creation, or enhancement.

For purposes of Clean Water Act (CWA) Section 404 permits where dredge or fill activity is proposed in waters of the United States, all aquatic resource areas, including wetlands, should be clearly identified and assessed in relation to project impacts. The U.S. Army Corps of Engineers should also be consulted for comments on wetland issues and language must be included that informs the public of the potential requirement of a Section 404 permit for any discharge of dredged or fill material into waters of the U.S., including wetlands (contact Mr. Allan Steinle of the Corps of Engineers Montana Regulatory Office in Helena at 406-441-1375).

Any changes in jurisdictional wetlands associated with the legal decision on Solid Waste Agency of Northern Cook County (SWANCC) applicable to isolated intrastate non-navigable wetlands may apply in regard to 404 permit requirements. EPA and the Department of the Army jointly issued an Advance Notice of Proposed Rulemaking (ANPRM) on Jan. 15, 2003. The ANPRM seeks information on factors related to the jurisdictional status of isolated intrastate non-navigable waters under the CWA, invites comments as to whether any other clarifications are needed to the existing jurisdictional regulations, and seeks information on the potential

aquatic resource impacts of SWANCC as well as information on State water resource protection programs for isolated waters. The ANPRM comment period closes Apr. 16, 2003. Additional information on SWANCC and the ANPRM may be found on EPA's website at http://www.epa.gov/owow/wetlands/swanccnav.html.

Pollution Prevention

Pollution Prevention, also known as "source reduction," encompasses practices which reduce, eliminate, or prevent pollution at its source. By reducing the total amount of pollution that is produced, there is less waste to control, treat, or dispose of, and there are less hazards posed to public health and the environment. Under Section 6602(b) of the Pollution Prevention Act of 1990, Congress established a national policy that organizes preferences for pollution prevention. CEQ provided guidance for incorporating pollution prevention into NEPA through a memorandum to Federal Department and Agency heads (Federal Register, January 29, 1993, pages 6478 - 6481, http://ceq.eh.doe.gov/nepa/regs/poll/ppguidnc.htm). The Supplemental EIS should address avoidance and reduction of pollution at the source as the preferred course of action to lessen the need to recycle, treat and otherwise implement the objectives of the 1990 Pollution Prevention Act.

Tribal Coordination

Executive Order 13175, "Consultation and Coordination With Indian Tribal Governments," was issued on November 6, 2000 to assure meaningful consultation and collaboration with tribal officials in the development of Federal policies with tribal implications, and to strengthen U.S. government-to-government relationships with Indian tribes. Agencies are directed to respect Indian tribal self-government and sovereignty, honor tribal treaty & other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments, and have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.

The U.S. has a unique relationship with tribal governments which requires that Federal government plans, projects, programs and activities assess impacts on tribal trust resources, and carry them out in a knowledgeable, sensitive manner respectful of tribal sovereignty. Trust resources are located within the exterior boundaries of reservations and outside the reservation in Usual and Accustomed fishing and hunting areas. Agencies should assess all impacts to tribal trust resource and include those impacts in the agencies' environmental documents, and should consult to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. The environmental document shall fully disclose the potential environmental impacts, both negative and positive, on tribal trust resources.

Environmental Justice

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," requires that Federal agencies make environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health and environmental effects of its programs, policies, and activities on minority populations and low-income populations. Environmental justice encompasses a broad range of impacts covered by NEPA, including impacts on the natural or physical environment and interrelated social, cultural, and economic impacts. The STB should develop a strategy for effective public involvement of minority (e.g., Native American) and low-income populations in Tongue River Railroad planning considerations, analyzing environmental, social, cultural and economic effects, and developing mitigation measures. Detailed guidance on addressing Executive Order 12898 in NEPA documents is available from CEQ, http://ceq.eh.doe.gov/nepa/regs/ej/justice.pdf.

There is a small Amish settlement approximately ten miles north of Ashland, Montana, in Rosebud County. The SEA should evaluate whether this community is low income and whether environmental impacts are likely to fall disproportionately on it. (Because the settlement was established in the mid-1990s, the earliest U.S. Census that would have covered it is the year 2000 Census.)